ATLAN HOLDINGS BHD & ANOR

v.

TAN SRI DATO' TAJUDIN RAMLI

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HELILIAH MOHD YUSOF JCA
AHMAD MAAROP JCA
[CIVIL APPEAL NOS: W-02-425-2008 & W-02-426-2008]
28 APRIL 2008

CIVIL PROCEDURE: *Injunction - Injunction restraining defendants from disposing assets - Stay - Principles applicable - Whether there was an arguable case against defendants - Undertaking as to damages - Whether injunction ought to be dissolved*

CIVIL PROCEDURE: *Execution - Stay - Injunction restraining defendants from disposing assets - Principles applicable - Whether there was an arguable case against defendants - Undertaking as to damages - Whether injunction ought to be dissolved*

The present two notices of motion by the 17th, 18th and 19th defendants – treated as appeals proper in the interests of justice – sought to stay an injunction granted by the High Court in favour of the plaintiff against the 17th defendant. The basis of the plaintiff's claim was that the 17th defendant proposed to dispose its assets and thereby frustrate any judgment the plaintiff may obtain. Insofar as the 17th defendant was concerned, the main thrust of its argument in support of its appeal was that all the impugned transactions that formed the basis of the plaintiff's complaint in the main action were done by special administrators appointed by the 1st defendant, one Pengurusan Danaharta Nasional Bhd. Accordingly, the 17th defendant did nothing to injure the plaintiff. The second ground on which the 17th, as well as the 18th and 19th, defendants supported their respective appeals was the absence of an undertaking as to damages from the plaintiff when obtaining its injunction.

Held (allowing the appeals)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The main complaint, as could be seen from the plaintiff's own pleaded case, was levelled against the special administrators and not against the 17th defendant. It was also clear from the plaintiff's arguments that the judge excused the giving of an undertaking because the 17th defendant would not suffer any damage in consequence of the orders made by her. With respect, this was the wrong question that she asked herself. The right question was whether the 18th and 19th defendants who had agreed to purchase the assets and liabilities of the 17th defendant would suffer damage in consequence of the injunction. Quite obviously, that question was not asked. Further, this court could not accept the plaintiff's submission that if the injunctions were not in place, it may not be able to recover anything from the 17th defendant in the event of success. In the event of the plaintiff's success, it had recourse against the 18th and 19th defendants as well as the special administrators, and there was nothing to suggest that these defendants would not be able to meet the plaintiff's claim. In summary, the two appeals must succeed for the following reasons: (i) there was, on the facts, no arguable case disclosed against the defendants; and (ii) there was no good reason to excuse the plaintiff from giving the usual undertaking as to damages. (paras 3, 4, 5, 6, 7, 8 & 9)

Bahasa Malaysia *Translation Of Headnotes*

Dua notis usul yang dikemukakan oleh defendan-defendan ke 17, 18 dan 19 di sini – yang ditukar kepada rayuan-rayuan bagi memenuhi kepentingan keadilan – memohon untuk menggantung injunksi yang diberikan oleh Mahkamah Tinggi untuk manfaat plaintif dan terhadap defendan ke 17. Asas tuntutan plaintif adalah bahawa defendan ke 17 berhasrat untuk melupuskan aset-asetnya sekaligus menggagalkan penghakiman yang mungkin diperolehi oleh plaintif. Setakat yang berkaitan dengan defendan ke 17, teras utama hujahnya bagi menyokong rayuannya adalah bahawa kesemua transaksi yang dicabar yang menjadi asas rungutan plaintif di dalam tindakan utama adalah dilaksana oleh pentadbir khas yang dilantik oleh defendan pertama, iaitu Pengurusan Danaharta Nasional Berhad. Ini bermakna tiada apa pun yang dilakukan oleh

defendan ke 17 yang boleh mencederakan plaintif. Alasan kedua yang dibangktikan defendan ke 17, dan defendan-defendan ke 18 dan 19, bagi menyokong rayuan mereka masing-masing adalah tentang ketiadaan akujanji mengenai gantirugi oleh plaintif sewaktu memperoleh injunksi.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Bantahan utama, seperti yang boleh dilihat dari kes yang diplidkan plaintif sendiri, adalah terhadap pentadbir khas dan bukannya terhadap defendan ke 17. Adalah juga jelas dari hujah plaintif bahawa hakim memaafkan pemberian akujanji kerana defendan ke 17 tidak menanggung sebarang kerugian akibat dari perintah-perintah yang dibuat oleh beliau. Dengan hormat ini hakim telah bertanyakan soalan yang salah. Soalan yang betul adalah sama ada defendan-defendan ke 18 dan 19 yang telah bersetuju untuk membeli aset-aset dan liabiliti defendan ke 17 akan menanggung kerugian akibat dari injunksi. Jelas bahawa soalan ini tidak ditanya. Selain itu, mahkamah ini tidak dapat menerima hujah plaintif bahawa tanpa injunksi ia tidak akan mendapat apa-apa dari defendan ke 17 jika tuntutannya berjaya. Jika berjaya, plaintif boleh menuntut dari defendan-defendan ke 18 dan 19 serta pentadbir khas, dan tiada apapun yang menunjukkan bahawa defendan-defendan tersebut tidak mampu memenuhi tuntutan plaintif. Kedua-dua rayuan, pendek kata, harus berjaya atas alasan-alasan berikut: (i) di atas fakta, tiada kes boleh dihujah telah dikemukakan terhadap defendan-defendan; dan (ii) tiada alasan kukuh untuk memaafkan plaintif dari memberikan akujanji biasa mengenai gantirugi.

Case(s) referred to:
Kuwait Oil Tanker Co SAK and another v. Al Bader and Others [2000] 2 All ER 271 ***(dist)***

(Civil Appeal No: W-02-425-2008)
For the appellants - K Kirubakaran; M/s Kiru & Yong
For the respondent - Lim Kian Leong (Low Chi Cheng with him); M/s Lim Kian Leong & Co

(Civil Appeal No: 02-426-2008)
For the appellant - Joseph Yeo; M/s Joseph Yeo
For the respondent - Lim Kian Leong (Low Chi Cheng with him); M/s Lim Kian Leong & Co

[Appeal from High Court, Kuala Lumpur; Suit No: D2-22-673-2006]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] This morning we had before us two notices of motion seeking to stay an injunction granted by the High Court on 14 April 2008 in the following terms:

> An Order that the 17th Defendant to the Amended Counterclaim (Naluri Corporation Bhd), whether by itself, its subsidiaries, servants agents or otherwise, howsoever, be restrained from completing the proposed:
>
> (a) Disposal details of which appear in paragraph 2.1 of the Announcement dated 5.1.2007 made by Aseambankers Malaysia Berhad on behalf of the 17th defendant to the counterclaim or any similar or other proposal for the disposal of the Business of the 17th defendant to the Amended Counterclaim;
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> (b) Capital Repayment details of which appear in paragraph 2.2 of the Announcement dated 5.1.2007 made by Aseambankers Malaysia Berhad on behalf of the 17th Defendant to the Counterclaim or any similar or other proposal for the return of a substantial amount of Capital to shareholders of the 17th Defendant to the Amended Counterclaim.

[2] With the consent of counsel we treated the motions as appeals proper in the interests of justice. The facts which lie at the heart of the dispute between the parties are complex and the case has a long history. Many of the parties who were defendants in the court below are not before us. The present appeal is brought by only three defendants in the court below, namely, the 17th, 18th and 19th defendants. The basis of the claim of the plaintiff (respondent before us) is that the 17th defendant proposes to dispose off its assets and thereby frustrate any judgment the

plaintiff may obtain. After lengthy argument over several days lasting about one year, the learned judge acceded to the plaintiff's summons and made the orders aforesaid.

[3] Insofar as the 17th defendant is concerned, the main thrust of its argument in support of its appeal is that all the impugned transactions that form the basis of the plaintiff's complaint in the main action were done by special administrators appointed by Pengurusan Danaharta Nasional Bhd, the 1st defendant in the court below. Accordingly, the 17th defendant did nothing to injure the plaintiff. These submissions are borne out by the plaintiff's own pleaded case. In particular, the following three paragraphs are relevant:

(a) paragraph 180 at p 247 of the record of appeal:

> Regarding the capital repayment under the tender it was represented that the Special Administrators (SAs) have decided it is the best interests of all stakeholders of Naluri for Naluri to proceed with a capital repayment of at least RM690,516,320.00 on the basis of RM1.00 per share. Tajudin contends that the Sas should not have been concerned 'the best interests of all stakeholders of Naluri' and in so doing were acting in breach of their duties and *ultra vires* the provisions of the Danaharta Agreement.

(b) paragraph 215 p 258 of the record of appeal:

> The Naluri shares SPA, Naluri Acquisition, SHB Investment, SHB Property Acquisition and capital repayment formed part of the purported 'workout proposal' proposed and implemented by the SAs over Naluri Bhd despite the fact that Naluri itself did not owe any money to Danaharta.

(c) paragraph 232 at p 267 of the record of appeal:

> The SAs of Naluri have entered into and completed a series of transactions known as the 'SHB Property Acquisition', the 'SHB Investment' and the 'UL Group Acquisition' for a total cost of RM437,380,000.00.

[4] We are in agreement with the submissions of learned counsel for the 17th defendant. The plaintiff's case as pleaded in the foregoing paragraphs speaks for itself. As may be seen, the main complaint is levelled against the special administrators and not against the 17th defendant.

[5] The 2nd ground on which the 17th as well as the 18th and 19th defendants support their respective appeals is the absence of an undertaking as to damages from the plaintiff when obtaining its injunction. It is clear from the arguments from the learned counsel for the plaintiff that the learned judge excused the giving of an undertaking because the 17th defendant would not suffer any damage in consequence of the orders made by her. With respect, this is the wrong question to have asked herself. The right question is whether the 18th and 19th defendants who had agreed to purchase the assets and liabilities of the 17th defendant would suffer damage in consequence of the injunction. Quite obviously, that question was not asked.

[6] Learned counsel for the plaintiff submitted that if the injunctions were not in place, his client may not be able to recover anything from the 17th defendant in the event of success. With respect, we do not agree. In the event of the plaintiff's success, it has recourse against the 18th and 19th defendants as well as the special administrators. There is nothing to suggest that these defendants would not be able to meet the plaintiff's claim.

[7] It is trite law that on an application such as this, the court should first examine whether there is an arguable case against the defendant concerned. According to learned counsel for the plaintiff one of the main charges against the defendants in the main action including those before us in this appeal, is one of conspiracy. That is to be found in para. 175 of the plaintiff's pleaded case. That paragraph reads

> At all material times the 2nd and 3rd plaintiffs, acting through the 1st plaintiff were the purported charges over 309,648,000.00 ordinary shares in Naluri amounting to approximately 44.84% of the issued and paid up capital of Naluri which were beneficially owned by Tajudin. At all material times, CIMB acted as advisor to Atlan Holdings AHB/APSB and George Lim and was instrumental in strategizing as implementing the Naluri Shares SPA and the Naluri Scheme (comprising the capital repayment and Naluri Acquisition) as part of the overall conspiracy between the Government of Malaysia, Danaharta, Telekom, CIMB, Azman Yahya, Abdul Hamidy Hafiz, Zukri Samat, TRI (post Telekom takeover), Celcom (post Telekom takeover), Kris Azman and/ Order other directors and officers of Danaharta, Telekom, TRI, Celcom and/Order CIMB as pleaded above.

[8] You will see at once that there is no charge of conspiracy against the 17th defendant. Neither is there any against the 18th and 19th defendants. Learned counsel for the plaintiff submitted that these 3 defendants joined the conspiracy later, and were therefore liable as joint conspirators. He referred us to the decision of the English Court of Appeal in *Kuwait Oil Tanker Co SAK and another v. Al Bader and Others* [2000] 2 All ER 271 in support of his submission. We agree with the propositions stated in that case. But they have no application to the present instance because there is no averment by the plaintiff that the defendants in this appeal later joined a pre-existing conspiracy.

[9] In our judgment the two appeals before us today must succeed for the following reasons in summary. First, no arguable case has been disclosed against the defendants before us. Second, there is no good reason to excuse the plaintiff from giving the usual undertaking as to damages.

[10] For the reasons already given, these appeals are allowed. The order of the High Court dated 14 April 2008 is hereby set aside save as in respect as to costs. The injunction thereby granted is hereby dissolved. The respondent must pay the costs of this appeal. A word about costs though. There has only been one argument in this appeal, we therefore disallow the item of getting up on the 18th and 19th defendants' bills of costs presented for taxation. However, these two defendants will be entitled to their out of pockets and profit costs. The deposits in court are to be refunded to the respective appellants.